No. 4529

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARIE GAZZERA and A. GAZZERA,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR

Upon Writ of Error to the Southern Division of the United States District Court for the Northern District of California, First Division.

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STATEMENT OF FACTS.

The plaintiffs in error were informed against by the United States Attorney for the Northern District of California for violation of the National Prohibition Act. The information, set forth in full from page 3 to page 5, inclusive, of the Transcript of Record, contains two counts. The first count attempts to charge maintenance of a common nuisance, alleging that the plaintiffs in error and one Hector Valentino, "on or about the 4th day of November, 1924, at 847 Montgomery Street, in the

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City and County of San Francisco, then and there being did then and there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises aforesaid, certain intoxicating liquor, to-wit: Two ounces red wine, two glasses white wine and one pint bottle part full of white wine." (Transcript pages 3 and 4.)

The second count attempts to charge an offense based upon the alleged unlawful possession of the same liquor. (Transcript page 5.)

he Plea.

At page 8, Transcript of Record, the plaintiffs in error pleaded "Not Guilty."

he Verdict.

At page 12, Transcript of Record, the jury returned a verdict finding plaintiffs in error guilty on both counts.

Motion for ew Trial.

At page 13, Transcript of Record, plaintiffs in error moved for a new trial and at page 14 the motion was denied.

At page 15 is set forth a motion in arrest of judgment, which motion is denied at page 18.

udgment.

At page 20, Transcript of Record, defendant, Mrs. Gazzera, is ordered to pay a fine of $500.00, and defendant, A. Gazzera, is sentenced to imprisonment for a period of three months.

Assignment of Errors.

At page 53, Transcript of Record, is set forth the assignment of errors in behalf of the plaintiffs in error.

STATEMENT OF PARTICULAR ERRORS DEMANDING REVERSAL OF THE JUDGMENT.

I.

The first question discussed is under assignment II, subdivision 7, page 56 of the Transcript of Record and relates to the conviction of a married woman for the alleged commission of a misdemeanor in the presence of her husband.

II.

The second question discussed is under assignment I, subdivision 2, and relates to the insufficiency of the evidence to justify the verdict.

III.

The third question discussed is under assignment I, subdivision 3, and is based upon the grounds that the verdict was contrary to the law.

IV.

The fourth question discussed is under assignment V and relates to the instructions given to the jury by the Court.

V.

The fifth question discussed is under assignment I and relates to the sufficiency of information.

ARGUMENT.

I.

THE VERDICT WAS CONTRARY TO THE LAW. A WIFE IS NOT AMENABLE FOR A MISDEMEANOR COMMITTED IN THE PRESENCE OF HER HUSBAND.

In this action, A. Gazzera and Mrs. Marie Gazzera, his wife, were jointly charged with a violation of the National Prohibition Act, to-wit: maintaining a common nuisance and illegally possessing intoxicating liquor.

The uncontradicted evidence shows that Mr. and Mrs. Gazzera were husband and wife and were the proprietors of the premises wherein the liquor was alleged to have been found. (Transcript pages 23, 30 and 34.)

The evidence further shows that the plaintiffs in error were seated together at a table when the Government agents entered and found the alleged liquor at another table occupied by patrons of the restaurant.

Under this statement of facts, there can be no doubt but that, if an offense was then committed by Mrs. Gazzera, it occurred in the presence of her husband.

It is a familiar rule of the common law under which the Federal Courts act, that where a married woman commits a misdemeanor in the presence of her husband, the presumption arises that she acts under the threat, command and coercion of her husband, and that where a crime is so committed

the burden is upon the Government to prove the absence of coercion.

Accordingly, we respectfully submit that a presumption of coercion arose as to Mrs. Gazzera, and there being no attempt on the part of the Government to overcome or refute this presumption, Mrs. Gazzera was entitled to an acquittal.

In support of the contention, we respectfully call to the attention of the Court the long, uniform list of authorities quoted in 30 *C. J.* 791-793, and 21 *Cyc.* 1355.

This rule has been recognized in the District Court for the Northern District of California in the case of *U. S. v. Terry,* 42 Fed. 317, where Judge Ross instructed the jury as follows:

> "Where a married woman commits a misdemeanor in the presence of her husband, the presumption of law, nothing to the contrary appearing, is that she acts under the threat, command, or coercion of her husband; but, if the circumstances are such as to show that the husband, though in the same room with the defendant, did not exercise any control or coercion, but that the wife was the active, moving party, the presumption arising from the husband's presence will be removed and overcome."

In view of the fact that the Government made no effort whatsoever to overcome this time-honored presumption, we respectfully urge that, regardless of any other point discussed in this brief, the plaintiff in error, Mrs. Gazzera, is entitled to a reversal of judgment.

II.

THE COURT ERRED IN OVERRULING AND DENYING DEFENDANTS' (PLAINTIFFS IN ERROR) MOTION FOR AN ORDER VACATING THE VERDICT OF THE JURY AND GRANTING A NEW TRIAL.

The Evidence Was Insufficient to Justify the Verdict.

It will be remembered that the information charged the plaintiffs in error—first, with maintaining a common nuisance by keeping for sale certain intoxicating liquor; second—with the unlawful possession of the same liquor.

The evidence shows that on the night of November 4th, 1924, at about 8:10 P. M., two Government agents entered the premises owned by plaintiffs in error. That the plaintiffs in error and a waiter by the name of Hector Valentino were seated at a table in the dining-room eating their dinner. At another table from six to eight feet away, as testified by the Government witness, Glynn, (Transcript page 25,) and fifteen feet away as testified to by plaintiffs in error, Gazzera, (Transcript page 36) were seated six or eight people from Los Angeles and upon and under whose table wine was alleged to have been found. The plaintiffs in error testified that they never gave any wine to anyone; that neither did their waiter, Valentino, (Transcript page 32); that they never gave Valentino permission to sell any wine to anyone (Transcript pages 32-35); that no liquor was kept on the premises and that they never sold any wine (Transcript page 33); that if the plaintiffs in error had known

that these people from Los Angeles had any wine with them, they would not have permitted them to bring it into the restaurant (Transcript page 36); that they had no knowledge of any wine being served to these people; that no liquor was found in the premises other than that in the possession of the guests. (Transcript page 36).

The agents further testified that these guests told them (outside the presence of the plaintiffs in error) that the liquor had been purchased from the waiter Valentino, but not from either of the plaintiffs in error. (Transcript page 27.)

In discussing the sufficiency of the evidence, we will first consider the proof upon which the conviction of illegal possession is based, inasmuch as the nuisance charge arises out of the possession of the same liquor. Accordingly, lack of sufficient evidence to support the conviction of unlawful possession must result in the failure of the nuisance charge.

The only evidence introduced to support the charge of unlawful possession is that of the two prohibition agents who testified in behalf of the Government. Both of these witnesses testified that the only liquor in the restaurant was found upon and under the table of bona fide guests. (Transcript pages 23, 25, 26 and 27.)

Testimony of William Glynn,

One of these Witnesses:

Q. You say you found some wine in the possession of these defendants?

A. Not in their actual possession. It was on the table.

Q. At whose table was it?

A. There was a party of six if I remember right, three girls and three fellows sitting in there, and they had wine glasses in front of them.

COURT. These defendants not at the table?

A. Not at the same table, your Honor. About six or eight feet away from their table, a smaller table than that other table.

Q. Not at their table?

A. Not at their particular one; no sir.

Q. Do you know who were sitting at that table?

A. One gave the name of Mary Brown. That is all I know; so long as they said they had purchased there, we didn't ascertain any further; we asked if they would identify the party who sold and they said they would; we brought this waiter and they all said that is the man.

Q. When you first asked them where they got it what did they say?

A. They told us immediately; they bought it here.

Q. Didn't they as a matter of fact at first refuse to say who it belonged to?

A. No, they did not refuse, no, sir.

Q. Didn't they at the same time say it belonged to them?

A. Not to me, no, sir.

The COURT. You refer to the people who were drinking?

Mr. CALIFRO. Yes, your Honor.

A. Nor did I hear it, no, sir.

Q. Where are these people now?

A. I don't know.

Q. Did you place these people under arrest?

A. No, sir.

Q. Why?

Mr. FORD. I believe that is immaterial.

The COURT. I suppose he can tell why he didn't place them under arrest.

A. That wasn't the system at the time. The custom at the time was to ascertain if they were purchasing on the premises, and if they were we would lock the proprietor up.

Q. Did you ask the proprietor if that belonged to him or if he sold it to them?

A. We asked the guests, yes.

Q. What did they say?

A. The guests said, "Why, we bought it from this waiter here," and I said—there were two waiters there; one fellow was a smaller, little fellow. We brought this Valentino over and said, "Is this the man?" "Yes, this is the man."

Q. They said they bought it from the waiter?

A. Yes, sir.

Q. They didn't buy it from these people?

A. They didn't say so, no, sir.

Thus far in the record, there is an absolute failure of proof that either of the plaintiffs in error sold or delivered any liquor to the guests. There is an equal lack of evidence indicating, in the slightest degree, knowledge upon the part of either of the plaintiffs in error that the guests possessed any liquor in the premises. The testimony of the plaintiffs in error on that point is as follows:

Testimony of Mrs. Gazzera:

Q. Did you give any wine to anybody in those premises that evening?

A. No.

Q. Do you know whether or not Valentino did?

A. No, he did not.

The COURT. What did you say? He did or did not?

A. No, he did not.

Q. Did he say he did not?

A. Yes, he said he did not.

Q. Did he ever have your permission to sell any wine to anybody there?

A. No, sir, we didn't keep any liquor, any wine in our place.

Q. You never sold any?

A. I never did.

Q. You didn't have any wine yourself?

A. No, we had beer on our table, and a glass of milk for myself.

Q. You don't sell wine there or any kind of liquor there?

A. No, nothing.

Q. Did you see the agents find these bottles with anybody there?

A. No, I didn't know anything about it because there was strange people eating, and we didn't know what they had on the table. We were just eating and knew nothing about what they had at the table.

Q. Where were the other people sitting in that dining room with reference to your own table?

A. We were the first table as soon as you open the door, and these people were behind us, the last table in the dining-room.

Q. About how far apart? How far away?

A. Just about from you and here; that is all.

Q. Do you know where these people came from?

A. I don't know; I know he was a doctor—that is to say they came from Los Angeles. I didn't ask no questions.

Testimony of Mr. Gazzera:

Q. When you say saloon, what do you sell there?

A. Soft drinks only; a few cigars. (Transcript page 34.)

Q. Did you see the agents find these bottles on the premises?

A. Well, the agents came in, went to the tables; I don't know what they find. He says he find these things there, but we never sell anything.

Q. Who were sitting at the table where that came from?

A. A party of eight or ten. I forget how many there was. They said that they had come from Los Angeles.

Q. You don't know their names?

A. No, I don't.

Q. Did you hear anybody say that they bought the wine from Valentino?

A. No.

Q. Did you give Valentino any permission at any time to sell any wine there?

A. No, sir. (Transcript page 35.)

Q. Did you sell any liquor there?

A. No.

Q. Did your wife sell any liquor there?

A. No. (Transcript page 36.)

Cross-Examination.

I don't know what was doing there, because I never looked at all, because I never thought they had anything at all. If I knew it I wouldn't allow them to have anything. They were sitting at a big long table next to me, three or four tables between. (Transcript page 36.)

Now, we respectfully contend that this evidence is not sufficient to sustain a conviction of illegal possession on the part of the plaintiffs in error. Under these circumstances, the judgment rendered in this action is based upon an insufficiency of evidence. Indeed, the decisions go so far as to

hold that actual knowledge of one person that another has liquor in the former's household, does not warrant a conviction for illegal possession of the former.

People v. Archer (Mich.), 190 N. W. 622.

And that it is not a presumption of law that liquor found on one's premises is in possession of one who is in possession of the premises.

State v. Brown (Wash.), 209 Pac. 855.

And that knowledge by an employee of the possession of liquor by his employer, even his handling of it as an employee, does not constitute possession by him.

Feinberg v. U. S., 2 Fed. (2nd) 955.

In the case last cited, the Court of Appeals for the Eighth Circuit in reversing the judgment of the Trial Court, said at page 958:

> "Other portions of the instructions stated the rule more properly, but not as a corrected statement of the portion of the instructions quoted. By this portion of the instructions the jury were not told that possession by the employee, or his aiding and abetting another in the possession of intoxicating liquor, made a prima facie case of unlawful possession and cast upon such employee the burden of proving that the liquor was lawfully possessed, but were told that knowledge by the employee of the presence of this liquor on the master's premises during the time he was employed there to handle it made the employee equally guilty with the master. This instruction was inaccurate, and tended to mislead the jury as to the guilt of Ben Feinberg under the charge of unlawful possession. Proof of mere knowledge

> of the presence of the liquor, or of the handling of it as an employee, or of both of these facts, did not necessarily show either possession or unlawful possession by the employee. Because of this erroneous instruction the verdict finding Ben Feinberg guilty of unlawful possession should be set aside."

Conversely, we respectfully submit that where an employee possesses liquor without even the element of knowledge upon the part of his employer, the latter cannot be guilty of possession of such liquor.

The case now before the Court is more meritorious than any of the cases above cited, in that there is not the slightest showing that the plaintiffs in error or either of them had knowledge of the possession of liquor by their patrons.

Neither of the Government's witnesses testified that the plaintiffs in error had such knowledge or even that they were in a position to require it. Both of the plaintiffs in error testified that they had no such knowledge and they did not either know or believe that their waiter had possessed or sold such liquor. Surely, when one employs another to perform legal acts, and that other commits an act outside of the pale of the law, the former is not guilty of the offense. Yet, such is the contention of the Government in this case.

True, the Government agents might have suspected or even believed that the plaintiffs in error possessed guilty knowledge at the time of their

arrest, but the record fails to disclose any basis for such suspicion. Indeed, the Court of Appeals has said in the case of *De Villa v. U. S.,* 294 Fed. 535:

> "A conviction cannot rest on merely a strong suspicion of guilt."

The following quotation from the opinion of the Court is found at page 536:

> "The record shows that the conviction is based solely on the testimony of the witnesses Hesse and Hutchison. After a careful examination of their testimony, in connection with all the other evidence in the record, we are satisfied that it wholly fails to disclose defendant's connection with the transactions on which the indictment was based and on which he was convicted. While it raises a strong suspicion that there was some sort of connection between this defendant and the defendants who entered pleas of guilty, we have not been able to find in the record any evidence which shows this connection, and the inferences arising from the circumstances disclosed by the evidence as to the charge here under consideration are as consistent with innocence as they are with guilt. We do not deem it necessary to discuss the evidence in detail.
>
> The result is that, while the evidence raises in our minds a strong suspicion of defendant's guilt, we feel constrained to hold that there is no sufficient legal evidence to justify the verdict of guilty, and the judgment must therefore be reversed."

And again in the case of *Turinetti v. U. S.,* 2 Fed. (2nd) 15, the Court said at page 16:

> "We are further of the view that there was not sufficient evidence to take the case to the jury as to Azzolin. He may be guilty; the

facts and circumstances adduced arouse a suspicion of guilt, but a mere suspicion is not a sufficient ground on which to convict a man of any criminal offense.

All these facts together do not make out a case against Azzolin. His knowledge even that the still was in Turinetti's apartment would not render him guilty under the charge here; whether knowledge by Azzolin of Turinetti's intent, if in fact he had such, to set up and run a still in the premises, at and before he leased them to the latter, would render Azzolin guilty, need not be decided, because there is no evidence or circumstance in the case indicating either that Azzolin had such knowledge or that Turinetti harbored such intent. The fact of payment of the water rates is susceptible of an inference making for innocence; that is, that since this is often done by, and is usually required of, the landlord, such payment could well have been done in the usual compliance with a rule or an ordinance of the municipality. Whenever a circumstance, relied on as evidence of criminal guilt, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible. We conclude that the Court ought to have directed a verdict as to Azzolin, and so, for the two errors noted, the case as to him should be reversed."

And the same case holds at pages 16 and 17 that where the circumstances relied upon as evidence of guilt and susceptible of inferences favorable to the accused, they are robbed of all probative value, though, from inferences, guilt may be fairly deducible.

In the case now before the Court, the inferences, if any are needed, are all in favor of the plaintiffs in error.

In addition to the foregoing it is proper to call to the attention of the Court, the fact that courts of concurrent jurisdiction repeatedly held that evidence of facts that are as consistent with innocence as with guilt, are insufficient to sustain the conviction. As an illustration, we quote from the opinion in the case of *Willsman v. U. S.,* 286 Fed. 852, at page 856:

> "There is no evidence in the record of any previous association of the defendants in an unlawful traffic in drugs. While there is or may be ground for suspicion that they were associated together in the unlawful traffic in drugs, still under the evidence in the case, and also the lack of evidence, we are of the opinion that the language of this Court in *Union Pacific Coal Co. v. U. S.,* 173 Fed. 740, 97 C. C. A. 581, and quoted with approval in *Sullivan v. U. S.,* (C. C. A.) 283 Fed. 868, is applicable here:
>
> 'Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused: and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.'"

In the same case it is held that possession, to be incriminating, must be *personal* and *exclusive.*

Surely, the evidence in the case now before this Court cannot be distorted to show the slightest element of either personal or exclusive knowledge. Not only did the agents testify that the guests told them that the liquor had been purchased from the waiter Valentino, but the plaintiffs in error (Valentino was not in Court at the time of the trial) testified under oath that they had no knowledge of Valentino's liquor-selling activities if any existed.

This Court is familiar with the rule that it is the duty of the Government to prove the charges laid in the indictment or information in every material respect beyond a reasonable doubt, and before the jury can legally return a verdict of guilty they must find that every essential element to establish guilt has been proven. The law demands acquittal unless this proof is supplied.

Egan v. U. S., 287 Fed. 958.

We respectfully insist that none of the facts necessary to convict the plaintiffs in error are presented in this case. There is absolutely no proof in the record that these plaintiffs in error had anything to do with the possession of the liquor in their restaurant. Not only this, but also there is an absolute lack of proof that they even had any knowledge of its existence.

III.

IN REFERENCE TO THE NUISANCE CHARGE, THE VERDICT WAS CONTRARY TO THE LAW.

The law is well settled that before one can be convicted of maintaining a nuisance, he must maintain a nuisance—in other words, there must be continuity of action. The only evidence in this case is to the effect that a small portion of liquor was found on a table in the premises and that the plaintiffs in error did not know of it being there and that they never sold or authorized it to be be sold or knew that it was there.

Under the law the maintenance of a nuisance as defined by Title II, Section 21 of the National Prohibition Act, "implies a continuity of action for a substantial period."

Reynolds v. U. S., 282 Fed. 258;
U. S. v. Cohn, 268 Fed. 420;
Hattner v. U. S., 293 Fed. 281.

As was stated in the case of *U. S. v. Hill,* 1 Fed. (2nd Series) 957:

> "There is involved in the expression of common nuisance, the idea of continuity of action for a substantial period of time. The element is lacking in this case." (See also 1 Fed. 2nd Series, 875.)

The verdict of guilty under the first count for a common nuisance was clearly wrong. The testimony establishes only possession by someone else, and that that possession was not authorized by the plaintiffs in error, and under these circumstances

such possession does not constitute a common nuisance.

Riggs v. U. S., 299 Fed. 273.

To the same effect is *Ash v. U. S.,* 299 Fed. 277;
Withrow v. U. S., 1 Fed. 2nd Series 855;
Helsinger v. U. S., 1 Fed. 2nd Series 241.

It has been held that proof of possession of a small quantity of liquor on a single occasion is not sufficient to support a conviction of a nuisance.

Jones v. State (Okla.), 211 Pac. 1075;
Rex v. Liquors, 289 Fed. 781.

IV.

THE COURT INSTRUCTED THE JURY AT PAGE 38 OF THE TRANSCRIPT OF RECORD AS FOLLOWS:

> "Now a nuisance within the meaning of the Federal Prohibition Act, is any place where intoxicating liquors are kept for sale or barter, and if you believe from the testimony beyond a reasonable doubt that these defendants, who are admitted to be the proprietors of this particular place, kept liquor there for sale or barter, then they were violating the prohibition law and should be convicted."

The giving of this instruction was error because it is not a proper definition of a nuisance. To constitute a nuisance there must be a continuity of action. Merely keeping a small amount of liquor or making one sale, does not constitute a nuisance.

U. S. v. Hill, 1 Fed. (2nd) 957;
Ash v. U. S., 299 Fed. 277;

Riggs v. U. S., 299 Fed. 273;
Muncey v. U. S., 289 Fed. 780;
Hattner v. U. S., 293 Fed. 281;
Reynolds v. U. S., 282 Fed. 258.

The Court gave the following instruction:

> "The second count in this indictment charges possession, that this wine as charged here was in their possession. Now, it is charged that this liquor was intoxicating. Intoxicating liquor as defined in the National Prohibition Act is any liquor fit for beverage purposes that contains more than one-half of one per cent alcohol by volume. You have heard the testimony with reference to the alcoholic contents of this liquor that is involved in this case. The chemist testified that one bottle analyzed 10.3 per cent alcohol and the other 8.8 per cent, and if that is true and the liquor was fit for beverage purposes, it is intoxicating within the meaning of the statute, and it is a crime for one to have it in his possession, and any place where such liquor is kept for sale or barter is a nuisance within the meaning of the statute." (Transcript page 38.)

This is not a correct statement of the law. The instruction in the first place has confused unlawful possession with a nuisance, and did not correctly state the law as to what was unlawful possession. Mere possession of intoxicating liquor is no crime. There must have been unlawful possession, which is quite another story. A person possessing intoxicating liquor purchased pre-Volstead days is committing no crime. His Honor in the instruction above given would have the jury believe that no matter how a person came into possession, either

legally or illegally, such possessor should be convicted.

The Court gave the following instruction:

> "The defendants have each testified in their own behalf. Apply to their testimony the same test you do to that of any other witness, giving it such weight and credit as you think it is entitled to, keeping in mind, however, in weighing their testimony, the interest that they naturally have in the result of this trial." (Transcript page 39.)

This was error, because it prejudiced the minds of the jury against the defendants. They were innocent until proven guilty, and had a right to testify on their own behalf without having the Judge tell the jury that they in words should look upon their evidence with suspicion because they had an interest in being freed.

The Court also erred in giving the following instruction:

> "JUROR. If we think the liquor was brought in by these people could they be found guilty?
> The COURT. If the liquor was brought in by the people using it and served by the waiter would be guilty of possession. The question of whether they were maintaining a nuisance I think that would not be sufficient to justify a verdict of a nuisance, but they would be guilty of possession, and sale. If the waiter was acting for them and with their knowledge, although he may have been dealing with somebody else's liquor." (Transcript page 40.)

This instruction is error and extremely confusing. In the first place it is bad law to say that serving

wine belonging to someone else makes a person so doing guilty of possession. It is not the possession of the waiter but of the guests. There was no evidence to warrant the instruction, because no one ever testified that the defendants, or either of them, had knowledge of the waiter serving the guests wine. The waiter might have been guilty of possession, but the Court instructed the jury that if the liquor was brought in by the people using it and served by the waiter, that the plaintiffs in error would be guilty of possession and sale. The plaintiffs in error were not charged with making sale. The instruction is so palpably erroneous as not to need any citation of authorities.

V.

THE INFORMATION DID NOT CHARGE A COMMISSION OF A CRIME AGAINST THE UNITED STATES.

The first count alleges that, "did then and there wilfully and unlawfully maintain a common nuisance in that the said defendants did then and there wilfully and unlawfully keep for sale on the premises aforesaid certain intoxicating liquor, to-wit: 2 ounces of red wine, 2 glasses of white wine, and 1 pint bottle part full of white wine, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for beverage purposes.

That the keeping for sale of the said intoxicating liquor by the said defendants at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to-wit: the "National Prohibition Act." (Transcript pages 3-4.)

The above does not state a public offense inasmuch as it only states one isolated act, and does not even allege a sale but only alleges the keeping for sale of a quantity of wine that could in ordinary common sense not be capable of being sold for intoxicating purposes.

In the case of *U. S. v. Dowling,* 278 Fed. 630, at page 643, it is stated:

> "But in addition to all the foregoing, there is no *showing* of the 'maintenance' of a 'nuisance'. It may be said that, not only is there no showing that the intoxicating liquors were kept in a manner violative of the act, or in such manner as to come within the definition of a nuisance as contained in Section 21, but the allegations which should be present to show 'maintenance' were also wanting. The word 'maintenance' implies continuance, and the act implies it from the use of the word 'keep'. The meaning of these words was passed upon in the case of *Commonwealth v. Patterson,* 138 Mass. 498, 500, where the following language was used in reference to a liquor nuisance:
>
> > 'The proprietor of a building cannot be said to "keep or maintain" a common nuisance, within the meaning of Pub. St. c. 101, Sec. 6, making a building used for the sale of intoxicating liquors a nuisance, on the

> strength of a single casual sale, made without premeditation in the course of a lawful business. The words "keep or maintain" import a certain degree of permanence.'
>
> No facts are alleged in these counts of the indictment showing, or tending to show, a keeping or maintaining, or any other status from which permanence could be inferred."

Indictments held to be insufficient.

VI.

THE VERDICT SHOULD HAVE BEEN ACQUITTAL OF THE DEFENDANTS ON BOTH COUNTS.

The defendants Gazzeras should have been acquitted, as there is not sufficient evidence in the record to support the verdict of conviction. Without even attempting to prove any prior sales or of the bad reputation of the premises, the Government would have the jury believe that this place, owing to the fact that it was a cafe, was a public nuisance. Why did not the Government agent produce the guests who had the liquor on the table? They made no attempt to secure them as witnesses. The fact that guests take wine with them into cafes cannot be prevented by the owners. They are powerless in this regard and if the conviction in this case was allowed to stand, it would mean that the only safeguard a cafe owner could take would be to have a search warrant issued in every instance before permitting the guests to enter the premises.

The record is very brief in this case, and for that reason we are not quoting at length to show that the Government had no proof sufficient to warrant a conviction on either count. We have given a resume of the testimony in our Statement of Facts, which shows conclusively that the plaintiffs in error should have been acquitted. Taking the evidence in the worst possible light, to-wit: that the waiter Valentino did sell the liquor to the parties, there is not a scintilla of evidence to prove that the waiter did so under the instruction of the defendants, or with their permission, and if the Court correctly instructed the jury as it did on page 39 of the Transcript as follows:

> "Now, if the waiter was employed by the defendants and acting for them, and within their knowledge, then they are just as guilty of a violation of the statute as if they had made the sale themselves,"

we challenge the Government to point out any evidence to show that Valentino, the waiter, in selling the liquor to the parties, if he did so, which is very doubtful, acted for the defendants Gazzeras and within their knowledge.

The Court reiterated this instruction on page 40 of the Transcript, as follows:

> "The question of whether they were maintaining a nuisance I think that would not be sufficient to justify a verdict of a nuisance, but they would be guilty of possession, and sale, *if*

the waiter was acting for them and with their knowledge, although he may have been dealing with somebody else's liquor."

There is no evidence that the defendants Gazzeras knew that the guests had the liquor, and if the sale was made by the waiter, there is not a scintilla of evidence to prove that Gazzeras authorized or knew it. Without such proof, there could be no conviction, and to the contrary, in the affirmative we have the proof that both of the Gazzeras (Transcript pages 32, 34, 35) testified they never knew it or never gave their permission. The fact that Valentino was their waiter is not sufficient to overcome the direct evidence of the Gazzeras. The fact that a bottle was found under the table strongly indicated that the guests brought it in.

Neither the Gazzeras nor their waiter would have been so foolish as to sell forbidden wine to strangers from Los Angeles who, for aught the waiter knew, were Prohibition Agents in disguise.

CONCLUSION.

From the foregoing, we respectfully submit that the Court not only erred in giving instructions, but that the information was faulty in the respects we have hereinabove set out, and that the evidence in

the case is not sufficient in any particular to warrant the conviction on either of the counts.

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May 16, 1925.

Respectfully submitted,
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